

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Closed Captioning of Video Programming)	CG Docket No. 05-231
)	
Telecommunications for the Deaf, Inc. et al.)	
Petition for Rulemaking)	

COMMENTS OF HOME BOX OFFICE, INC.

HOME BOX OFFICE, INC.

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SUMMARY

Home Box Office, Inc. (“HBO”) is confident that the record developed in this proceeding will demonstrate that under the current closed captioning rules, the cable industry has made great progress in providing closed captioned programming and that its accomplishments, both quantitative and qualitative, have been significant. If programmers and distributors have the continued opportunity to build on their already proven track record using a combination of the latest advances in technology and the experience gained over the years of implementing captioning, such progress will continue unabated.

The *NPRM* does not contain evidence of widespread problems, chronic non-compliance with Commission closed captioning rules, or other material deficiencies that would justify, or be improved by, the layer of additional closed captioning regulations discussed in the *NPRM*. To the contrary, the proposed regulatory changes would create unnecessary burdens on television programmers, multichannel video program distributors, broadcasters and the Commission, and would yield few, if any, improvements in closed captioning services. Rather than improving the quality of captioning, such proposals would divert captioning resources away from where they can do the most good.

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Home Box Office, Inc. (“HBO”), through its attorneys, hereby submits these comments in response to the *Notice of Proposed Rulemaking* (“*NPRM*”) issued by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.^{1/} The *NPRM* was issued in response to a Petition for Rulemaking (“Petition”) filed by Telecommunications for the Deaf, Inc. et al. (“Petitioners”).^{2/}

The Commission has determined through the *NPRM* to evaluate the 1997 rules regarding mandatory closed captioning of television programming to make sure that the rules are fulfilling their policy objective of providing access to video programming by all Americans, including deaf and hard-of-hearing individuals. HBO is confident that the record developed in this proceeding will demonstrate the current rules’ effectiveness as well as the magnitude of the closed captioning accomplishments that have been realized in the last eight years. As we near the January 1, 2006, benchmark by which time 100 percent of “new” English language

^{1/} Closed Captioning of Video Programming, CG Docket No. 05-231, *Notice of Proposed Rulemaking*, FCC 05-142 (rel. July 21, 2005) (“*NPRM*”).

^{2/} See *id.* ¶ 1 (granting petition for rulemaking and initiating a proceeding to examine the Commission’s closed captioning rules). See also Telecommunications for the Deaf, Inc. et al, Petition for Rulemaking, Closed Captioning of Video Programming, RM No. 11065 (filed July 23, 2004) (“Petition”). Joining Telecommunications for the Deaf, Inc. (“TDI”) as Petitioners are the National Association for the Deaf (“NAD”), Self Help for Hard of Hearing People, Inc. (“SHH”), the Association for Late Deafened Adults (“ALDA”), and the Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”).

programming is required to be captioned, the Commission and the entities that are subject to the closed captioning rules should take pride in their achievements, both in terms of the quantity of video programming that has been and is being captioned, and in the steady improvement in the quality of captioning services.

HBO acknowledges, as the Petitioners point out, that closed captioning is not perfect. Due to the required human intervention in captioning, it is doubtful that perfection can ever be achieved. Nevertheless, the flaws that have been identified do not evidence widespread problems, chronic non-compliance with Commission rules, or other material deficiencies that would justify, or be improved by, the layer of additional closed captioning regulations that Petitioners advocate. To the contrary, the regulatory changes discussed in the *NPRM* would create unnecessary burdens on television programmers, multichannel video program distributors (“MVPDs”), broadcasters and the Commission, and would yield few if any improvements in closed captioning services.

I. THE QUANTITY AND QUALITY OF CLOSED CAPTIONING HAS IMPROVED DRAMATICALLY

In 1996, Congress amended the Communications Act to require that video programming be closed captioned to ensure accessibility for deaf and hard of hearing individuals.^{3/} The Commission adopted captioning rules implementing the Congressional mandate in August 1997.^{4/} Prior to these rules, closed captioning of video programming was completely voluntary. Although HBO and some other programmers, MVPDs and broadcasters, provided substantial amounts of captioning on a voluntary basis for years before the rules were adopted, others provided very little.

^{3/} 47 U.S.C. § 613.

^{4/} See Closed Captioning and Video Description of Video Programming – Implementation of Section 305 of the Telecommunications Act of 1996: Video Programming Accessibility, *Report and Order*, 13 FCC Rcd 3272 (1997) (“*Report and Order*”); Closed Captioning and Video Description of Video Programming – Implementation of Section 305 of the Telecommunications Act of 1996: Video Programming Accessibility, *Order on Reconsideration*, 13 FCC Rcd 19973 (1998) (“*Reconsideration Order*”).

Recognizing the difficulty of implementing a change from voluntary to mandatory captioning, especially in light of the limited number of captioning services and the need to train many more captioning professionals, the Commission created a transition schedule that it found “provide[s] a balanced approach that will result in full accessibility in a reasonable amount of time.”^{5/} The major part of the transition will be completed this year. By January 1, 2006, 100 percent of a video programming distributor’s “new” English language, non-exempt video programming must be closed captioned.^{6/}

A. The Amount of Captioning Has Increased Dramatically

Since the captioning rules were adopted, video programmers and distributors have been working diligently to implement the new requirements. The progress has been dramatic.

Prior to the adoption of the captioning rules, captioning was generally limited to the national broadcast networks, the top 20 basic and expanded basic cable networks and the six most widely distributed premium cable channels.^{7/} The broadcast networks were captioning about 80 percent of their programming at that time, local broadcast stations were providing less than an hour a day of captioned, non-network programming, and the top 20 basic and expanded basic cable networks and the six most widely distributed premium cable channels were captioning a combined total of approximately 24 percent of their programming -- about 30,000 hours per year.^{8/}

^{5/} *Report and Order*, 13 FCC Rcd at 3293-95 ¶¶ 42-47.

^{6/} 47 C.F.R. § 79.1(b)(1). *See Reconsideration Order*, 13 FCC Rcd at 19978-82 ¶¶ 9-11. In the *Reconsideration Order*, the Commission recognized that there may be limited exceptions that would keep a video programming provider from reaching 100 percent in every instance. *Id.* at 19979 ¶¶ 10-11. For “pre-rule” programming, the Commission established a transition period that will require 75 percent of pre-rule programming to be captioned by January 1, 2008. 47 C.F.R. § 79.1(b)(2). *See Reconsideration Order*, 13 FCC Rcd at 19983-84, 19987-89 ¶¶ 20-21, ¶¶ 28-31.

^{7/} *See id.* at 19237-19248 ¶¶ 56-83.

^{8/} *See id.*; Closed Captioning of Video Programming, *Notice of Proposed Rulemaking*, 12 FCC Rcd 1044, 1055 ¶ 15 (1997).

Today, the captioning figures are indeed impressive. For example, HBO alone is captioning more programming per quarter than the annual combined basic, expanded basic and premium channel figure cited in the previous paragraph. In the third quarter of 2005, HBO captioned almost 33,100 hours of programming -- over 97 percent of its total programming ("new" and "pre-rule" combined) -- for its linear programming networks. All of HBO's new programming was captioned. Pre-rule hours were captioned at percentages above 90 percent for every channel, with some single channel rates as high as 99 percent.^{9/} Additionally, over 99 percent of the more than 1100 On-Demand hours offered by HBO and Cinemax during the same quarter was captioned. Each of these captioned hours passed HBO's stringent quality control process described below, ensuring that the quality of HBO's captioning is very high.

Other programmers likewise have increased their captioning amounts. Except for those entities that have various exemptions from the rules, as of January 1, 2006, the national broadcast networks, local broadcast stations and some 400 cable television networks will be required to caption 100 percent of their new non-exempt programming and at least 30 percent of the pre-rule programming.^{10/}

B. Mechanisms Are in Place to Ensure Captioning Quality

There is no dispute that the quantity of programming that is closed captioned has grown dramatically over the last eight years as the industry has worked to meet the Commission's ever increasing benchmarks. The Petition suggests, however, that there continues to be a lack of focus on captioning quality that should be addressed by new regulations. HBO disagrees. In fact, HBO and many other programmers, as well as MVPDs and broadcasters, have extensive quality control mechanisms in place to ensure the integrity of all aspects of their signals, of which closed captioning is but one. A brief description of HBO's processes is instructive.

^{9/} The Commission's requirement for "pre-rule" hours is currently 30 percent, meaning that, at its worst, HBO exceeded the Commission's mandate by over 60 percentage points in the third quarter of 2005.

^{10/} 47 C.F.R. § 79.1(b).

HBO's quality control program monitors 16 categories of potential technical issues associated with video, audio and closed captioning, the occurrence of any one of which is considered a disruption to the service. HBO's goal is to have each of the 30 linear programming feeds it originates experience no more than 5.5 minutes of programming disruption per year -- a reliability factor of more than 99.999 percent. Over the past two and a half years, more than 25 of HBO's programming feeds have met this reliability goal consistently. Those linear feeds that fell short of the goal missed it by an insignificant amount on an annual basis.

As noted above, closed captioning errors are part of the 16 components that HBO reviews for quality control/reliability purposes. **HBO has found that closed captioning errors on its feeds account for less than ten percent of all disruption events (*i.e.*, less than 30 seconds per year). In fact, in HBO's experience, the errors in closed captioning are fewer than the miniscule amount of audio discrepancies.**

Because closed captioning is a core component of HBO's quality control program, HBO follows specific practices to ensure that the closed captioning on each program is of the highest quality. Closed captioning is managed and monitored closely by HBO's Network Quality Control department to ensure that HBO meets or exceeds the Commission's requirements for captioned programming each quarter. This department tracks: (i) categorization and captioning amounts; (ii) quality control; and (iii) program monitoring.

All HBO programming is categorized either as a theatrical or an HBO original program. Theatricals are feature-length films created by motion picture studios and licensed to HBO for exhibition on HBO services. Approximately 90 percent of the theatrical titles are provided to HBO with closed captions on the master tape which are checked for quality by the provider. On an as-needed basis, HBO outsources the remaining 10 percent of the theatrical titles (provided to HBO without captions) to third-party vendors who create and screen the captions for quality. HBO's original programming is either closed captioned in-house or is outsourced to third-party vendors. In both instances, the completed captions are screened for quality.

Each title (whether it is provided to HBO with captions, captioned by HBO in-house or outsourced to a third-party) undergoes a strict quality control review process by HBO's Network Quality Control department before it is approved for air. Each master tape is reviewed at HBO Studio Productions by a videotape evaluator in the Network Quality Control department. The evaluator measures the tape's technical specifications including the quality of the video, audio, and closed captions. During the quality control process, the captions are continuously displayed on the monitor while the evaluator reviews the videotape for technical compliance. The evaluator also spot checks the accuracy of the closed captions in selected scenes by comparing the closed captions to the dialogue and the action. Once master tapes have passed quality control, they are sent to HBO's Communications Center where they are prepared for air.

After the initial quality control review, each title is again reviewed during the ingest process by which the content is put into playback server systems for air. At air time network operations personnel confirm the presence of closed captions. Last minute revisions are sometimes made to a program based on requests from the program's producer or from HBO's legal department. In these instances, the captions are also edited to maintain consistency. Finally, the scheduled program goes to air.

There is no reason to believe HBO's captioning policies and procedures are unique. Indeed, high quality captioning is a standard in the video programming industry, and it is common for video program services to have in place extensive quality controls for closed captioning. According to the National Cable & Telecommunications Association ("NCTA"), it is an industry standard for program networks to routinely monitor their equipment to ensure high-quality transmissions and the technical quality of each program.^{11/} In addition, cable operators routinely monitor their equipment to ensure high quality transmissions of each signal's video, audio and line 21 closed captioning material.^{12/}

^{11/} Opposition of the National Cable & Telecommunications Association, Petition for Rulemaking, RM-11065, at 9-10, 15 (Oct. 4, 2004) ("NCTA Opposition").

^{12/} *Id.* at 9, 15.

II. THE CURRENT CAPTIONING RULES ARE ACHIEVING HIGH QUANTITATIVE AND QUALITATIVE RESULTS, AND FURTHER CAPTIONING REQUIREMENTS ARE UNNECESSARY

As the foregoing discussion makes clear, the television programming industry as a whole has made great progress to comply with the Commission's 1997 closed captioning rules. With the major part of the Commission's transition plan almost complete, the Commission's *NPRM* now seeks to determine if a series of new regulations is necessary to ensure access to programming by deaf and hard of hearing individuals. Specifically, the Commission asks whether it should adopt rules dealing, among other things with: (i) non-technical quality standards, (ii) technical quality standards, (iii) monitoring requirements, (iv) complaint procedures, including a standardized complaint form, (v) specific fines and penalties for captioning failures, and (vi) compliance reports.

The Commission previously has considered, and rejected, many of the rules now being discussed in the *NPRM*, in some cases finding specifically that the "additional restrictions would impose unnecessary burdens on programming providers and the Commission to implement and enforce."^{13/} HBO submits that what the Commission concluded previously is equally true today. Such rules would stifle closed captioning flexibility and innovation, create enormous burdens for the Commission and closed captioning regulatees, and do little to further the stated objective of improving the amount and quality of closed captioning.

^{13/} *Reconsideration Order*, 13 FCC Rcd at 19993 ¶ 41. The Commission refused to standardize the complaint filing process, noting that allowing video programming distributors to develop individualized procedures for handling complaints would allow the parties to "more quickly and satisfactorily resolve the dispute" because of the "direct relationship" between the distributor and the consumer. *See id.* at 20025 ¶ 116. Compliance reporting was rejected as "overly extensive and costly." *Id.* at 20026-27 ¶ 118. The Commission viewed the Petitioners' audit proposal as unnecessary because it planned to conduct random audits of captioning. *Id.* Petitioners' request for a 20-day response time on complaints was rejected because the Commission had adopted a response timeframe (45 days after the end of a quarter) that was reasonably calculated towards allowing the video programming distributor enough time to gather the appropriate information while ensuring a prompt response for the consumer. *Id.* at 20025 ¶ 116. Petitioners' request for minimum standards for measuring was viewed by the Commission as "unclear" and burdensome. *Id.* at 19993 ¶ 41.

A. Evidence of a Problem with Existing Captioning Rules Is Not Compelling

There is nothing in the record leading up to this proceeding that demonstrates the need to revise the Commission's captioning rules. The examples of captioning failures described by Petitioners were merely anecdotal evidence involving a handful of instances. There is no evidence to suggest a widespread pattern of problems justifying a heavy regulatory response. Although Petitioners claimed to "understand that some small errors will occur," much of the "evidence" of problems they presented focused on precisely these types of small errors -- *e.g.*, "foul" instead of "fowl," "rights" instead of "rites," "lane" instead of "lain."^{14/} HBO believes that such errors should be corrected as much as possible and will likely diminish as captioning services gain more experience, but it is difficult to believe that such errors "affect the comprehensibility of a program" as Petitioners claim.^{15/}

Petitioners also listed a number of problems with captioning that allegedly "occur with frequency."^{16/} These include situations in which captioning is turned off before the end of a program or movie, as well as situations in which captioning is listed as included with a programming but is not provided.^{17/} Petitioners provided essentially no factual support for these assertions (except two e-mails that appear, like many provided in the Petition, to be an answer to a solicitation for captioning problems rather than one independently sent), and cite only Commission reports that describe the state of closed captioning prior to the adoption of the Commission's rules in the mid-1990s.

The Petitioners attached a total of nine anecdotal complaints registered over a period stretching from June 2002 until October 2003. Nine complaints involving rules required of the nation's broadcast networks, all of its local broadcast stations, cable operators and some 400 cable programming networks in a time period of 17 months does not suggest a pattern of problems requiring regulatory redress -- it shows that the Commission's policies are for the most

^{14/} Petition at 37-38.

^{15/} *Id.* at 37.

^{16/} *Id.* at 26.

^{17/} *Id.* at 26-27.

part working. In fact, in the eight years since the closed captioning rules were adopted, it appears that the Commission has only had to adjudicate approximately eight captioning cases.

B. The Proposals Are Overly Burdensome And Would Not Improve the Quality of Captioning

In the absence of any significant, demonstrated problems with current captioning rules and compliance, there is no reason to add another layer of regulation and, in effect, create a solution in search of a problem. The anecdotal examples of captioning failures are precisely the types of issues that can be dealt with on a case-by-case basis under the existing rules. Moreover, in view of the quality control mechanisms that already are in place, the frequency of these failure events most likely will decrease over time. If there are chronic problems with particular program suppliers, MVPDs or broadcasters, the rules in place are more than adequate to address them.

Even if the types of captioning problems identified by Petitioners were widespread or severe, the rule change proposals discussed in the *NPRM* will fail to improve the quality of captioning. As the 2003 NCI Report acknowledges, “because captioning is the last stage in the production process, the quick turnaround time required for programs to be captioned before their broadcast inevitably leads to errors in transcription, encoding, or transmission.”^{18/} This is especially true for live programming. The only realistic way to deal with these human error issues is experience. Additional regulatory requirements of the type discussed in the *NPRM* will simply create burdens on the Commission and industry and ultimately divert captioning resources away from where they can do the most good. In the remainder of these comments, HBO will address some of the specific rule proposals set forth in the *NPRM*.

1. Compliance Reports

The *NPRM* seeks comment on the Petitioners’ proposal to require video programming distributors to file compliance reports on the amount of closed captioning they provide.^{19/} Such a

^{18/} Annenberg Public Policy Center of the University of Pennsylvania, *The State of Closed Captioning in the United States* 43 (2003) (“2003 NCI Report”).

^{19/} *NPRM* ¶ 15.

proposal is unnecessary. Program services, such as HBO, maintain extensive internal reports of their captioning activities. In HBO's case, these reports are customized to its internal systems and are designed to enable HBO to certify to its affiliate MVPDs that its captioning complies with the FCC rules. Petitioners would replace this process with one that would require programmers to submit extensive reports to MVPDs who would then be required to compile, translate and aggregate the reports from the programming services along with their own reports on origination programming into an FCC form. The proposal to create this FCC report would merely impose an additional level of record-keeping, further increasing the costs of captioning compliance. Moreover, such a requirement would be counterproductive as it would guide industry to a one-size-fits-all solution for reporting compliance rather than allowing video programmers and MVPDs to assess the individual characteristics of their own systems. Finally, the Commission has already rejected this approach because "it would impose unnecessary administrative burdens on video programming distributors and the Commission."^{20/} There is no suggestion that the circumstances and justifications for that rejection have changed.

2. Shortening Complaint Process Timetable

Petitioners' proposal for changing the timetable for resolving consumer complaints before proceeding to the FCC would not be practicable.^{21/} As an initial matter, when problems with closed captioning arise, the primary objective should be to identify the source of the problem and correct it -- not to resort to a time consuming and costly complaint process at the FCC. To accomplish that objective, sufficient time is needed before the regulatory complaint process is triggered.

Although HBO attempts to handle any complaint regarding its services (whether related to video, audio, captioning or other matters) as soon as possible, programmers and distributors need sufficient time to determine the source and nature of the problem and address the issue. Depending on the facts, video programming distributors may be required to seek additional

^{20/} *Reconsideration Order*, 13 FCC Rcd at 20026-27 ¶ 118.

^{21/} *NPRM* ¶¶ 26-31.

information from various video programming providers. Video programming providers then must investigate the specific programs at issue, discuss their findings with the distributor, and together reach a conclusion regarding the stage at which the problem occurred. Often, the source of the malfunction is found to lie with end user equipment or its use, a problem that is difficult to diagnose. All of these interactions necessarily require sufficient time. This is why the FCC has previously rejected a proposal to shorten the time period for filing complaints.^{22/} Again, nothing has changed the circumstances justifying that conclusion.

3. Quality Standards

Petitioners also proposed to require that a program meet minimum “standards” set by the Commission for completeness, accuracy, readability and synchronicity to be considered “captioned” under the rules, but they did not explain how such extensive “standards” would be created or implemented, or how they could possibly be monitored.^{23/} The types of standards being proposed do not lend themselves to easy measurement or compilation. The effort would require an extensive level of monitoring that would be unprecedented for quality control in the video programming context. In fact, it is instructive that the Commission does not have quality standards for other aspects of video programming, such as the audio or video quality. As the Commission has previously concluded, “[m]easuring and monitoring a specific percent, *e.g.*, minutes, words or some other criteria” would be difficult, result in “unclear” standards, and “would impose unnecessary burdens on programming providers and the Commission to implement and enforce.”^{24/}

4. Forfeiture Amounts

The Commission also seeks comment on whether it should, as the Petitioners suggested, establish specific per violation forfeiture amounts for non-compliance with the captioning

^{22/} *Reconsideration Order*, 13 FCC Rcd at 20025 ¶ 116.

^{23/} *NPRM* ¶¶ 10-16.

^{24/} *Reconsideration Order*, 13 FCC Rcd at 19993.

rules.^{25/} This proposal is unnecessary as the Commission already has the authority to impose appropriate penalties, including forfeitures.^{26/} In fact, the Commission has used its forfeiture authority to sanction entities for material violations of the captioning rules.^{27/} Furthermore, imposition of the specific per violation amount would take away the Commission's current flexibility to tailor penalties to fit the magnitude of the violation.

5. Monitoring of Captioning

Acting on the Petitioners' assertion that "many technical problems could be eliminated if 'video programming distributors and providers had mechanisms in place to monitor captioning and routinely check their engineering equipment and procedures,'" the Commission seeks comment on whether there should be specific mechanisms in place for monitoring and maintenance.^{28/} As demonstrated above from HBO's internal procedures for quality control of video, audio and closed captions, the Petitioners' assertion is based on a lack of understanding of industry practices for quality control. The development of these industry practices is driven by a competitive marketplace dedicated to providing the highest quality service to consumers. If monitoring and other quality control procedures are left to the competitors in the marketplace, rather than dictated by regulation, innovation will spur technical advances that will better serve the consumer. Finally, Petitioners make no mention as to how such a regulatory monitoring provision would be enforced, what "specific mechanisms" would eliminate the asserted captioning problems or how those problems would be solved by monitoring.

^{25/} *NPRM* ¶ 39.

^{26/} 47 C.F.R. § 79.1(g); *NPRM* ¶ 39.

^{27/} See, e.g., Channel 51 of San Diego, Inc., File No. EB-04-TC-067, *Notice of Apparent Liability for Forfeiture*, DA 05-456 (rel. February 23, 2005) (finding Channel 51 apparently liable for a forfeiture in the amount of \$25,000 for willfully and repeatedly violating the FCC's closed captioning rules by failing to make emergency information accessible during a wildfires emergency in San Diego).

^{28/} *NPRM* ¶¶ 23-25.

6. Accessibility of Contact Information

The *NPRM* seeks comment on the Petitioners' request to require video programming distributors to post complete contact information on their websites, in bills and in telephone directories, update the information on a routine basis, and provide the information to the FCC for posting on its website.^{29/} No rationale has ever been given as to why this extra contact information is necessary since all video programming distributors maintain customer service contact points as part of their standard operations.^{30/} Moreover, having all this information on a central FCC website would require an enormous effort to gather and to update information from thousands of broadcasters and other programming distributors throughout the country. This is precisely the sort of administrative burden that the Commission has resisted repeatedly.

CONCLUSION

In establishing the high standards of its captioning rules, the Commission understood that making video programming fully accessible to deaf and hard of hearing individuals through high quality and reliable closed captioning would require video programmers and distributors, equipment manufacturers, and consumers to work together. HBO supports these goals, and while the transition to this new system has not been flawless, tremendous progress has been made. The best means of ensuring that progress continues is to avoid imposing burdensome and unnecessary new requirements that would divert attention and resources away from the real goal.

^{29/} *NPRM* ¶¶ 32-33.

^{30/} NCTA Opposition at 3-4.

Respectfully submitted,

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